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IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,

—vs.—

MARY VATSIS,

Respondent,

Appellant.

FILED

14 1959

ark, Supreme Court, Utah

BRIEF OF APPELLANT

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STATE OF UTAH,

Respondent,

—vs.—

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} Case No. 8989

BRIEF OF APPELLANT

(The parties will be referred to as they appeared in the trial court. Tr. refers to the pages of the Reporter's Transcript. R. refers to that portion of the Record consisting of papers filed in the Clerk's office.)

PRELIMINARY STATEMENT

This is an appeal by defendant from a judgment of conviction (R. 76) entered upon a jury's verdict of guilty of the crime of obtaining money under false pretenses (R. 59).

The case went to trial on an information (R. 15) which was amended during the course of the trial (R. 57, Tr. 134) and in which it was alleged that defendant obtained a check from the Commercial Credit Corporation by "representing and selling" to Commercial Credit Corp. "a fraudulent Conditional Sales Contract" purportedly entered into between Ann Troulis and the V & H Motor Company "which Conditional Sales Contract was fraudulent and forged."

The State filed a Bill of Particulars (R. 20) in which it specified the conduct of defendant Mary Vatsis relied upon to establish the defense:

"Mary Vatsis signed the name 'Ann Troulis' to the contract without authority and with intent to aid her husband and co-defendant to obtain money by false pretences."

Mary Vatsis was charged jointly with her husband. The trial court granted a motion to dismiss the action against him because of the absolute lack of evidence tending in any way to establish his guilt of the offense. The State, in detailing his conduct in the Bill of Particulars (R. 20) stated as follows:

"He was a principal in the execution of a fraudulent contract. He acknowledged that one Ann Troulis purchased a car from him, which was, in fact, false and which fraudulent signature he was aware of."

STATEMENT OF FACTS

Commercial Credit Corporation was in the business of purchasing Conditional Sales Contracts on automobiles (Tr. 11). The V & H Motor Company was an automobile dealership in Price, Utah. It sold its contracts to Commercial Credit. The office manager of Commercial Credit testified in dealing with that concern he dealt with both the defendant and her husband John (Tr. 11). Leon Green, unit manager for Commercial Credit, testified he ordinarily dealt with John and very seldom with defendant Mary (Tr. 44). As a matter of fact the V & H Motor Company was John Vatsis doing business under that name. The defendant only worked there.

The contracts would be submitted by the dealer to the Commercial Credit Corporation and it, in turn, would investigate the purchaser's credit, etc., and would then issue a check to the dealer (Tr. 11). John or defendant Mary would either mail the contract in or bring it in personally (Tr. 12). The charge here is founded upon a Conditional Sales Contract on a 1956 Buick automobile (Exhibit 1). The contract was dated March 9, 1957 and the V & H Motor Company by John Vatsis appears therein as the Seller and Ann Troulis as the Buyer (Tr. 13).

Commercial Credit purchased the contract on March 12, 1957, and paid the sum of \$2,175.00 for it (Tr. 13).

The check issued was in the amount of \$6,700.00 and included other contracts (Tr. 15, Exhibit 3). The check was endorsed and paid (Tr. 15). The check was given to John Vatsis (Tr. 129).

This same Buick was floor planned by V & H Motor Company with Commercial Credit Corporation on April 4, 1957 (Tr. 21).

As indicated, the State's case is based upon the proposition that the contract was forged. The only two persons who could testify concerning this matter were Ann Troulis and Mary Vatsis. Ann Troulis did not testify that she did not authorize Mary Vatsis to sign her name to the contract. Mary Vatsis testified very definitely that authority was given to her to sign the name of Ann Troulis to the contract (Tr. 146, 156). We will discuss this phase of the testimony under the Argument in the brief.

STATEMENT OF POINTS

POINT I.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT OF GUILTY.

POINT II.

THE TRIAL COURT ERRED IN GIVING ITS INSTRUCTION NO. 3.

ARGUMENT

POINT I.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT OF GUILTY.

Inasmuch as the charge was necessarily based upon the forgery of the contract we will discuss the absolute lack of any evidence to show forgery.

Ann Troulis testified that on or about March 8, 1957, she discussed with Mary Vatsis the purchase of an automobile (Tr. 57). Included in this discussion was whether or not Miss Troulis could afford an automobile. She testified that she indicated to defendant to go ahead and take whatever steps were necessary to effect the financing of the automobile. She left it up to the defendant to take care of the details (Tr. 57). During this conversation they talked about making out a contract for Miss Troulis to get an automobile. Within a short period of time thereafter Miss Troulis called defendant on the phone to inform her that she couldn't afford to pay for the automobile and the deep freeze and therefore she wanted to cancel the contract which had been made up for the purchase of the car (Tr. 57, 58). She definitely testified that after the contract had been made she changed her mind and told defendant to cancel it (Tr. 58).

After the foregoing was disclosed on cross examination, the prosecutor took over and was given permission to cross examine Miss Troulis on the grounds she was a hostile witness. She testified as follows:

“Q. Didn't you authorize Mary Vatsis to sign your signature to that contract?

A. I can't answer yes or no to that.

Q. You know whether you did or not, don't you, Miss Troulis?

A. I can't remember. I maybe did.

Q. Do you think you did?

A. I may have.

Q. Do you think you authorized her to sign your name to that contract?

A. I may have." (Tr. 59, 60)

Apparently there is an error in the transcript because the testimony referred to in the preliminary hearing undoubtedly was that Miss Troulis did not tell defendant she could use her name, but, in any event, she explained the reason for any change in testimony as follows:

"A. I answered 'no' because I was afraid that if I answered in any other way I would be implicated in this and because I have more or less been—well, I have been bull-dozed by a few people so far as this contract and things like that are concerned." (Tr. 60, 61)

Miss Troulis was told that if she did not sign a statement implicating defendant she would end up paying for the car (Tr. 62). Under cross examination of the prosecutor she testified:

“Q. You may have authorized her to sign your signature to a contract?

A. I may have. I am not saying I did and I am not saying I didn’t.” (Tr. 63)

She then testified:

“A. I am implying that from my last testimony I said, ‘No, I didn’t give her permission to use my name,’ and I have thought about it and I was afraid — I haven’t been mixed up in anything like this before — and I came up here with the thought I would be mixed up in getting a car I didn’t know anything about and I just felt my only answer was to say ‘no’ because I was afraid and I had been threatened.” (Tr. 63)

She then testified concerning authorization to sign the contract:

“Q. You didn’t authorize her to use your signature, did you?

A. I may have. I talked to her a lot of times about my getting a car.

Q. What did you authorize her to use your signature for, signing checks, buying a car or what?

A. I guess on a contract.

Q. For what?

A. A car, I was planning on buying a car.” (Tr. 63, 64)

Further testimony of Miss Troulis reveals the following:

“Q. Here is the point I am getting at: You told Mr. Hansen you called Mrs. Vatsis up and told her to cancel the contract. You tell me what contract you told her to cancel.

A. The one she was supposed to have made out.

Q. Which one?

A. The contract we talked about when she was at my house.

Q. Which contract?

A. For a car.

Q. What car?

A. Whichever one I tried out. I don't know.”
(Tr. 67, 68)

Concerning cancellation she testified:

“Q. How did you know what you were cancelling?

A. I knew because we had talked about it and I just felt to myself I didn't want to try paying for something else until I paid off the freezer so I called and told her that.”

She then testified:

“Q. But you didn't buy any other car or sign any other contracts nor did you authorize anyone to sign a contract for you, did you?

A. I don't know whether I did or not. I may have.

Q. Your testimony in December would be more reliable than it is today?

A. No, because since December I have thought and thought about it and it's bothered me because when I came up here—and I was really afraid because that was after I had been more or less threatened by Commercial Credit and I felt any other explanation I tried to make other than 'yes' or 'no,' I would get stuck with a Buick." (Tr. 68)

In her testimony Miss Troulis refused to testify that her name had been signed to the contract in question without her authority. Inasmuch as the charge was based on the supposed misrepresentation resulting from passing a forged contract, this ended the State's case.

Defendant recalled this sale and testified she talked with Ann Troulis at the Sooklaris home on the evening of March 8 (Tr. 146). They discussed the purchase of the 1956 Buick. Defendant did not have any contract forms with her and she explained to Ann how the contract could be executed and "when I left I was under the impression that she was buying the car and that I had her authority to sign her name." She also testified:

"Q. Is it your position that you sold the automobile, a 1956 Buick automobile, to Ann Troulis?

A. That is right.

Q. It was an actual, genuine sale?

A. Yes.

Q. And she authorized you to sign her name to the contract?

A. Yes." (Tr. 156)

Miss Troulis later cancelled this contract and on March 13, defendant called Commercial Credit and talked to Leon Green. She told him not to process the contract because Ann had told her that she had better pay off the deep freeze and not a car. V & H Motor Company had already received the check from Commercial Credit at this time (Tr. 146, 147).

State v. Howd, 55 Utah 527, 188 P. 628, (1920) and *State v. Timmerman*, 88 Utah 481, 55 P. 2d 1320 (1936) have set forth the elements necessary to make out the crime of obtaining money by false pretenses. They are (1) a false or fraudulent representation (2) made knowing it to be such (3) with intent to cheat or defraud the person to whom the representation was made. (4) An actual fraud must have to be perpetrated in the sense that something of value was obtained and the victim lost something of value. (5) The representation must have induced the owner to part with his property in the sense that the owner parted with his property in reliance upon the truth of the representation.

By the Amended Information as limited by the Bill of Particulars, it was necessary that the State establish that the contract with Ann Troulis was forged. We submit the foregoing evidence will not support a finding of forgery and hence, defendant's Motion for Directed Verdict should have been granted.

This failure on the part of the State's proof, also eliminates other elements of this offense. If there was no forgery, the contract assigned to defendant was enforceable against Miss Troulis. In this respect Commercial Credit obtained that which it bargained for and hence, an essential element was not present which required a directed verdict. *State v. Casperson*, 71 Utah 68, 262 P. 294 (1927); *State v. Fisher*, 79 Utah 115, 8 P.2d 589 (1932); *State v. Morris*, 85 Utah 10, 38 P.2d 1097 (1934).

The fact that a certificate of title was not delivered to Commercial Credit was of no importance here because in the ordinary course of events that would not be delivered for 30 to 60 days and the Commercial Credit did not expect title when the money was paid for the contract, but expected it to be delivered in the future (Tr. 23). The sale of this contract could only imply a promise to deliver a certificate of title in the future. Failure to deliver the title as promised could only result in a breach of contract and upon it could not be based a criminal complaint for fraud. Such a promise is not a misrepresentation of a material existing fact. See *State v. Howd*, 55 Utah 527, 188 P. 628 (1920).

In the *Howd* case, *supra*, the defendant sold the cattle of one Foy to Adams and Consley, and gave to Foy an insufficient funds check. The court stated concerning this transaction which is analagous to the one presented in the case at bar :

“The testimony is absolutely clear that no actual fraud was intended or perpetrated in this state. All that can be gathered from the record of the testimony is to the effect that defendant purchased Foy’s cattle at Thompsons, Utah, that he there paid to Foy a part of the purchase price, and promised to pay the balance upon the arrival of the cattle at Grand Junction, Colo., a promise to be performed in the future. This was a very ordinary and perfectly legitimate transaction, and one that would not legally justify any inference of an intention to cheat or defraud Mr. Foy out of his property. Let it be conceded, although it is not shown from the testimony, that the defendant did not intend to pay for the cattle upon their arrival at Grand Junction, yet his representation that he would pay was purely promissory in character, and therefore may not be held as a fraudulent representation or false pretense in the legal meaning or acceptance of the terms.”

Also, in its case at bar, the testimony will not support a finding that there was any intent on behalf of defendant to cheat or defraud anyone.

In the Bill of Particulars as heretofore set forth, it appears that the position of the State was that defendant Mary Vatsis aided and abetted John Vatsis in the perpetration of the crime of obtaining money by false pre-

tenses. A Motion to Dismiss at the close of the State's case was granted as far as John Vatsis is concerned and this should also have resulted in the now defendant Mary Vatsis being dismissed, or certainly a directed verdict granted.

There is absolutely no evidence that Mary Vatsis ever, at any time, presented this contract or received any money from Commercial Credit.

We submit that under the evidence produced by the State it constituted error for the trial court to deny defendant's motion for a directed verdict and, therefore, this case should be reversed.

POINT II.

THE TRIAL COURT ERRED IN GIVING ITS INSTRUCTION NO. 3.

Instruction No. 3 set forth the elements which, if the State proved them, would justify the jury in returning a verdict of guilty.

The fundamental error in this instruction is that it departed from the charge as contained in the Amended Information and the Bill of Particulars. No place in this instruction was it required that the State prove beyond a reasonable doubt that the contract in question was forged.

It uses the words "bona fide sale" and "fictitious contract." There is no evidence which would permit the presentation of any such issue to the jury.

The instruction is general in that it uses only the foregoing language and there is no definition of its terms.

What does the word "fictitious" mean? In the ordinary sense of the word in criminal law, it is used to describe a situation where person uses a name which is not his own or that of any known person; hence, the check or obligation is known as fictitious. No such situation existed in the case at bar. *State v. Jensen*, 103 Utah 478, 136 P.2d 949.

The use of the words "bona fide sale" is also confusing. If this contract involved in this case was not forged, then it was enforceable against Ann Troulis and if it was enforceable against Ann Troulis this would not constitute the offense of obtaining money by false pretences because Commercial Credit would have received a contract which was enforceable and, therefore, would have obtained that for which it bargained, as indicated by the cases cited under Point I herein.

This instruction is indicative of the fact that the trial court must have felt the State had utterly failed to produce evidence which would support a finding of forgery and, therefore, sought to change the charge.

This instruction is also bad because there is no evidence which would support a finding that the contract was either fictitious or did not constitute a bona fide sale. We have heretofore indicated why it is that it is not fictitious. If this contract were enforceable it would

of necessity be a bona fide sale and whether or not it is enforceable goes back to the old proposition of whether or not a forgery in fact, was committed.

Subparagraph 1 of this instruction requires a finding that Mary Vatsis presented to Commercial Credit the conditional sales contract signed by Ann Troulis. There is no evidence that Mary Vatsis ever presented this conditional sales contract to the Commercial Credit or that she had anything to do with the transaction with Commercial Credit.

We submit that this departure from the charge contained in the Amended Information and Bill of Particulars constituted prejudicial error, it was further prejudicial because the evidence did not support the giving of such instruction.

CONCLUSION

We respectfully submit the State failed to introduce evidence which would permit a jury to find the contract in question was forged. We further submit the trial court was aware of this deficiency in the State's evidence and in order to make a presentable case, departed from the charge set forth in the Amended Information and the Bill of Particulars which required forgery, and gave the jury an instruction in the field of fictitious contracts and bona fide sales. We submit that in departing thusly the court committed prejudicial error to the rights of the defendant in this case.

We respectfully pray that the court reverse the verdict and judgment of conviction and order that a direct verdict in favor of the defendant be entered, or in the event this is not done, that the case be reversed for a new trial.

Respectfully submitted,

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